(1)

Supreme Court, U.S.
FILED

98 1764 MAY 3 1999

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ROBERT PATIS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois,
First Judicial District

PETITION FOR WRIT OF CERTIORARI

FREDERICK F. COHN
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Chicago, Illinois 60605
(312) 641-0692
Attorney for Petitioner

37pp

(1a) QUESTIONS PRESENTED

1. Where defendant was charged only with driving while license revoked - he was never charged with driving while license suspended - but he was convicted of driving while license revoked upon proof that his license was not revoked, but suspended:

(A) Does the Appellate Court's affirming Order violate defendant's due process right to proof beyond a reasonable doubt of the offense charged, by holding that proof of some other offense is sufficient where the offenses were similar in character and defendant, in substance, knew for what conduct he was charged - thereby upholding defendant's conviction on the basis of an offense with which he was not

charged?

(B) Does the supposed absence of prejudice neutralize or eliminate the due process violation, where there is absolutely no proof of the offense as charged?

(C) Does the affirmance here violate constitutional due process principles as stated by this Court in such decisions as Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644 (1948); Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979); Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654 (1960); and Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 252 (1960), expressly reaffirming Ex Parte Bain, 121 U.S. 1, 30 L.Ed. 849 (1887)?

1(b) Parties Involved

Petitioner, Robert Patis, was the defendant in the Circuit Court of Cook County, Illinois; the Appellant in the Appellate Court of Illinois; and the Petitioner in the Illinois Supreme Court.

Respondent, People of the State of Illinois, was the Plaintiff in the Circuit Court of Cook County, Illinois; the Appellee in the Appellate Court of Illinois; and the Respondent in the Illinois Supreme Court.

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1. Certiorari should be allowed to review the judgment below, because defendant's conviction and its affirmance violate his due process right not to be convicted except upon proof beyond a reasonable doubt of the offense charged, and instead the Appellate Court has held that proof of some other offense than that charged is sufficient where the offenses were similar in

character and defendant, in substance, knew with what conduct he was charged.

The decision of the Appellate Court should be reversed:

A. Defendant's due process right not to be convicted except upon proof beyond reasonable doubt of the offense charged was violated when "defendant was convicted of driving while his license was revoked based on evidence that his license was suspended . . . ." (Order, App. A, p. App. 2)

B. The supposed absence of prejudice does not neutralize or eliminate the due process violation, where there is absolutely no proof of the offense as charged.

C. Thus, defendant's conviction here violates constitutional due process principles as stated by this Court in such decisions as Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644 (1948); Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979); Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654 (1960); and Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 252 (1960), expressly reaffirming Ex Parte Bain, 121 U.S. 1, 30 L.Ed. 849 (1887).

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner, Robert Patis, prays that a writ of certiorari issue to the Appellate Court of Illinois, First Judicial District, to review its judgment affirming the judgment of conviction and sentence for driving while license revoked.

1(d) Citations of Opinions and Orders Below

The judgment ("Summary Order") of the Appellate Court of Illinois, First Judicial District, No. 1-97-4160, dated September 8, 1998, affirming defendant's conviction and sentence for driving while license revoked - unreported - is set out at App. A, pp. App. 1-8. That Court's order, dated October 14, 1998,

denying petition for rehearing, also unreported, is set out at App. B, p. App. 9-10.

The order of the Illinois Supreme Court, No. 86510, dated February 3, 1999, denying petition for leave to appeal - unreported - is set out at App. C, p. App. 11.

1(e) Jurisdictional Statement

The judgment sought to be reviewed was entered by the Illinois Appellate Court on September 8, 1998. (App. A) Rehearing was denied on October 14, 1998. (App. B) The order of the Illinois Supreme Court denying petition for leave to appeal was entered February 3, 1999. (App. C)

Jurisdiction of this Court is invoked under 28 U.S.C. 1257 and Rules

12 and 13 of this Court.

1(f) Constitutional Provision and Statute Involved

The federal constitutional provision involved is the due process clause of the 14th Amendment to the United States Constitution.

The Illinois statute involved is 625 ILCS 5/6-303(a).

The text of these provisions is set out in Appendix E, pp. App. 14-15.

1(g) Statement of the Case

Statement of Facts

Defendant was driving a car. The police curbed defendant's car because defendant allegedly passed the police car on the right (Tr. 19, 21),[1] and

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[1] Here and hereafter, "C" refers to pages of the Common-Law Record, and "Tr." to pages of the Transcript of Proceedings.

swerved from the southbound lane into the northbound lane. (Tr. 8-9) The police asked for identification, and determined that defendant was driving without a valid license.

Defendant was charged in a traffic ticket accusing him of "driving while license revoked." (Complaint T6-414-552, C2) The court found defendant guilty of "driving while revoked." (Tr. 39)[2]

The evidence presented (per stipulation), was that defendant's license was not revoked, but merely suspended. (Tr. 6) Subsequently, defense counsel stated:

> "The only stipulation was the defendant's license was

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[2] The court stated: "[A]s to ticket number T6414552, driving while revoked, there will be a finding of guilty." (Tr. 39)

> suspended. . . . The only stipulation was there was a suspension, not that there was a revocation, nor the basis of a revocation." (Tr. 43)

In its Summary Order (App. A), the Appellate Court stated: "[D]efendant was convicted of driving while his license was revoked based on evidence that his license was suspended . . . ." (Order, App. A, p. App. 2)

1(g)(i) Raising the Federal Question

Defendant raised the federal question here presented in his Brief on Appeal in the Appellate Court of Illinois (Appellant's Brief, p. 8); in his Appellant's Reply Brief (pp. 4-9); and in his Petition for Rehearing (pp. 2-11); and in his Petition for Leave to Appeal to the Illinois Supreme Court (pp. 3-15).

The Appellate Court did not rule on the federal constitutional question squarely presented, but simply found "no prejudice" and affirmed. (App. A)

Although defendant pointed out to the Appellate Court on rehearing, and to the Illinois Supreme Court on petition for leave to appeal, that the federal constitutional question raised was not ruled on, those courts did not rule on the question thereafter, to wit:

Rehearing was denied without opinion. (App. B, pp. App. 9-10)

Petition for leave to appeal was denied without opinion. (App. C, p. App. 11)

REASONS FOR ALLOWING THE WRIT

Certiorari should be allowed to review the judgment below, because defendant's conviction and its affirmance violate his due process right not to be convicted except upon proof beyond a reasonable doubt of the offense charged,[3] and instead the Appellate Court has held that proof of some other offense than that charged is sufficient where the offenses were similar in character and defendant, in substance, knew with what conduct he was charged.

The decision of the Appellate Court should be reversed:

A. Defendant's due process right not to be convicted except upon proof beyond reasonable doubt of the offense charged was violated when "defendant was convicted of driving while his license was revoked based on evidence that his license was suspended . . . ." (Order, App. A, p. App. 2)

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[3] That is, the due process right to be convicted only of the charge as brought, and not to be convicted without proof beyond reasonable doubt of every element of the charge as brought. Whenever we speak of the due process constitutional right not to be convicted except upon proof beyond reasonable doubt of the offense charged, we invoke the above formulation.

B. The supposed absence of prejudice does not neutralize or eliminate the due process violation, where there is absolutely no proof of the offense as charged.

C. Thus, defendant's conviction here violates constitutional due process principles as stated by this Court in such decisions as Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644 (1948); Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979); Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654 (1960); and Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 252 (1960), expressly reaffirming Ex Parte Bain, 121 U.S. 1, 30 L.Ed. 849 (1887).

Defendant here was charged only with driving while license revoked; he was never charged with driving while license suspended. However, he was convicted of driving while license revoked without proof that his license had been revoked, upon proof that his license was suspended.

The Appellate Court held:

"Although defendant was

> convicted of driving while his license was revoked based on evidence that his license was suspended, we find that no reversal of defendant's conviction is warranted because defendant has failed to show that he was prejudiced by the variance between the charge and the proof."
> (Order, App. A, p. App. 2)
> (Emphases added.)

This holding violates defendant's due process rights under the 14th Amendment because it is the equivalent of convicting defendant of an offense with which he was not charged. Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644 (1948).

In Cole v. Arkansas, supra, whereas petitioners were convicted under an information charging them with a violation of § 2 of Act 193 of the 1943 Arkansas Legislature, the State Supreme Court had affirmed their convictions on

the ground that the information had charged and the evidence had shown that they had violated § 1 of that Act. Id. at 198, 92 L.Ed. at 646. This Court found that "[P]etitioners were clearly tried and convicted by the jury for promoting an unlawful assemblage made an offense by § 2, and were not tried for the offense of using force and violence as described in § 1." Id. at 199, 92 L.Ed. at 647. This Court reversed, holding that:

> "It is as much a violation to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made," id. at 201, 92 L.Ed. at 647-48;

and that:

> "To conform to due process of law, petitioners were entitled to have the validity of their

> convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Id. at 202, 92 L.Ed. at 648.

So, too, here, the Appellate Court should have declined the State's invitation to uphold defendant's conviction on the basis of an offense with which he was not charged. In context, that means, at bar, that defendant's conviction for the offense charged, i.e., driving with license revoked, cannot be upheld on the basis that the evidence demonstrated the offense of driving with license suspended, with which he was not charged.

It is immaterial that the conviction as it stands could be used as a double jeopardy bar to another

conviction. That is not the issue. The issue is whether the defendant has a right to be proven guilty only of the offense with which he is charged, by proof beyond reasonable doubt of that offense, so that if - as here - the State fails in that obligation, the defendant must be acquitted.

> "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. Cole v Arkansas, 333 US 196, 201, 92 L Ed 644 . . ." Jackson v. Virginia, 443 U.S. 307, 314, 61 L.Ed.2d 560, 570 (1979).

In this case, driving while license revoked is a crucial element of the offense charged. The record here is wholly devoid of any evidence to support that element, but instead, supports a charge that was never made, that is,

driving while license suspended. As synopsized in Jackson, supra, this Court in Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654 (1960), held "that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged" is a violation of due process. (Emphasis added.) In reaching its conclusion in Thompson, this Court stated:

> "Just as 'conviction upon a charge not made would be sheer denial of due process,' [quoting from DeJonge v. Oregon, 299 U.S. 353, 362, 81 L.Ed. 278, 282 (1937), and citing also to Cole v. Arkansas, supra] so is it a violation of due process to convict and punish a man without evidence of his guilt." Thompson, 362 U.S. at 206, 4 L.Ed.2d 659.

Here, there was no evidence

whatsoever that defendant's license was revoked. Just as in Thompson v. City of Louisville, supra, the conviction here should be reversed because the evidence is devoid of proof of an essential element of the charge.

In accord with the principle that one cannot constitutionally be convicted on a charge not brought, cf. Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 252 (1960) - expressly reaffirming Ex Parte Bain, 121 U.S. 1, 30 L.Ed. 849 (1887).

To repeat, what we have here is a conviction absent any evidence at all to support an essential element of the offense charged, in violation of the due process principles elucidated above.

The affirmance here violates the

constitutional due process principles discussed above, as stated in Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644 (1948); Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979); Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654 (1960); and Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 252 (1960), expressly reaffirming Ex Parte Bain, 121 U.S. 1, 30 L.Ed. 849 (1887).

C O N C L U S I O N

For the foregoing reasons, Certiorari should be allowed. On the merits, the judgment should be reversed.

Respectfully submitted,

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Attorney for Petitioner

APPENDICES

APPENDIX A

FIRST DIVISION

September 8, 1998

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-97-4160

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

ROBERT PATIS,

Defendant-Appellant.

) Appeal from the
) Circuit Court of
) Cook County.
)
) No. T6414552
)
) Honorable
) Edward N. Pietrucha,
) Judge Presiding.

SUMMARY ORDER

Following a bench trial, defendant Robert Patis was found guilty of driving with a revoked license in violation of section 6-303(a) of the Illinois Vehicle Code (Code). 625 ILCS 5/6-303(a) (West 1996) (driving while driver's license, permit or privilege to operate a motor vehicle is suspended or revoked). Defendant was sentenced to 7 days in jail and 30 days of community service. Defendant appeals, contending that the police lacked probable cause to stop him in his vehicle and that he was not proved guilty beyond a reasonable doubt of driving while his license was revoked.

The standard for determining whether or not an investigative stop of a vehicle is justified is less exacting

than probable cause to arrest or search. People v. Decker, 181 Ill. App. 3d 427, 430 (1989). An officer's observation of erratic driving, *[p. 2]* such as weaving between lanes, may provide sufficient cause to justify a traffic stop. People v. Diaz, 247 Ill. App. 3d 625, 627 (1993); Decker, 181 Ill. App. 3d at 430. Here, where the testifying officer observed defendant's vehicle swerve twice from the northbound lane into the southbound lane, the officer's observations provided a sufficient basis for making an investigatory stop of defendant's vehicle.

Defendant maintains that he was not proved guilty of driving while his license was revoked where the evidence at trial showed that his license was

suspended. Where a variance between the charging document and proof is raised for the first time on appeal, it is not fatal unless the variance is material and of such character as may mislead the accused in making his defense or expose him to double jeopardy. People v. Santiago, 279 Ill. App. 3d 749, 752 (1996). See also 725 ILCS 5/116-2(c) (West 1996). Although defendant was convicted of driving while his license was revoked based on evidence that his license was suspended, we find that no reversal of defendant's conviction is warranted because defendant has failed to show that he was prejudiced by the variance between the charge and the proof.

Section 6-303(a) of the Code

prohibits a person from driving at a time when his driver's license, permit or privilege to operate a motor vehicle is suspended or revoked. 625 ILCS 5/6-303(a) (West 1996). To prove a defendant violated section 6-303(a) of the Code by driving while his license was revoked, the *[p. 3]* State must show that the defendant was driving in Illinois and that his license had been revoked. People v. Morrison, 149 Ill. App. 3d 282, 284 (1986). At the beginning of trial, the parties stipulated that defendant's driver's license was suspended on the date of the offense. No other evidence was entered on this issue. Defendant did not raise the variance between the charge and the stipulated proof at trial or in a post-

trial motion. We read the stipulation as a concession by defense counsel that defendant was driving at a time when he was, per section 303(a) of the Code, not privileged to do so. The record thus establishes that the parties intended to remove this issue from contention by means of their stipulation. See People v. Williams, 200 Ill. App. 3d 503, 516 (1990).

During sentencing, the State noted that defendant had lost his driving privileges in 1981 by virtue of a mandatory revocation for driving under the influence and stated that the revocation was still in effect. Defense counsel made no objection to the State's repeated use of the term revocation or its representations that the defendant's

privileges had been revoked and never reinstated. We note also that the trial court used the terms revoked and suspended interchangeably. These, too, are indications that the defendant suffered no prejudice.

Finally, we note that operating a motor vehicle while one's driving privileges are revoked or suspended are both Class A misdemeanors, are violations of the same statutory section (625 ILCS 5/6-303(a) (West 1996)) and that the elements of proof and *[p. 4]* defenses for each charge are basically the same. People v. Hahn, 82 Ill. App. 3d 173, 176 (1980).

Defendant has failed to show that he was prejudiced by the variance between the charge and the proof and his

conviction for driving while his license was revoked is accordingly affirmed.

As part of our judgment, we grant the State's request and assess defendant $100 as costs for defending this appeal. This order is entered in accordance with Supreme Court Rule 23(c)(4). 166 Ill.2d R. 23(c)(4).

Affirmed.

GALLAGHER, J., with O'BRIEN, P.J., and O'MARA FROSSARD, J., concurring.

APPENDIX B

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
v.	)	1-97-4160
ROBERT PATIS,	)	
Defendant-Appellant.	)	

October 14, 1998

ORDER

This cause coming on to be heard on defendant-appellant's petition for rehearing, the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the petition for rehearing is hereby denied.

DATED: _____

ORDER ENTERED

OCT 14 1998

APPELLATE COURT, FIRST DISTRICT

[signed] Michael J. Gallagher
JUSTICE

[signed] Sheila M. O'Brien
JUSTICE

[signed] Margaret O. Frossard
JUSTICE

APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
86510 SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

February 3, 1999

Mr. Frederick F. Cohn
Attorney at Law
205 W. Wacker Dr., S#1515
Chicago, IIL 60606

No. 86510 - People State of Illinois, respondent, v. Robert Patis, petitioner. Leave to appeal, Appellate Court, First District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 25, 1999.

Printed on Recycled Paper

APPENDIX D

(SEAL)

Supreme Court of Illinois
SUPREME COURT BUILDING
SPRINGFIELD 62701

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

FIRST DISTRICT OFFICE
20TH FLOOR
160 NO. LASALLE ST.
CHICAGO, 60601
(312) 793-1332

TELECOMMUNICATIONS
DEVICE FOR THE DEAF
(217) 524-8132

TELECOMMUNICATIONS
DEVICE FOR THE DEAF
(312) 793-1333

February 23, 1999

Mr. Frederick F. Cohn
Attorney at Law
205 W. Wacker Dr., S#1515
Chicago, IL 60606

In re: People State of Illinois, respondent, v. Robert Patis, Petitioner.
No. 86510

The Supreme Court today entered the following order in the captioned cause:

Motion by petitioner/appellant for stay of mandate pending the filing of a petition for writ of certiorari in the United States Supreme Court. Motion Allowed.

A copy of the order is attached.

Very truly yours,

[signed] Juleann Hornyak
Clerk of the Supreme Court

cc: Hon. Jim Ryan
Hon. Richard A. Devine

APPENDIX E

Constitutional Provisions and Statutes Involved

The 14th Amendment to the U.S. Constitution, § 1, provides, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Chapter 625, Illinois Compiled Statutes [ILCS], § 5/6-303(a), provides:

> **"5/6-303. Driving while driver's license, permit or privilege to operate a motor vehicle is suspended or revoked.**
>
> (a) Any person who drives or is in actual physical control of a motor vehicle on any highway of this State at a time when such

person's driver's license, permit or privilege to do so or the privilege to obtain a driver's license or permit is revoked or suspended as provided by this Code or the law of another state, except as may be specifically allowed by a judicial driving permit, family financial responsibility driving permit, probationary license to drive, or a restricted driving permit issued pursuant to this Code or under the law of another state, shall be guilty of a Class A misdemeanor."